A

Hisham bin Halim v Maya bt Ahmad Fuad & Ors (Majlis Agama Islam Selangor (MAIS), intervener)

B

HIGH COURT (SHAH ALAM) — APPLICATION FOR JUDICIAL REVIEW NO BA-25–37–05 OF 2021
SHAHNAZ SULAIMAN J
29 AUGUST 2023

C

Civil Procedure — Jurisdiction — Conflict of jurisdiction between the High Court and Syariah Court — Syariah Court made interim custody order — Husband failed to comply with interim custody order — Wife filed application to Syariah High Court for leave to commence committal proceedings against husband — Syariah High Court allowed leave application — Husband filed judicial review against grant of leave by Syariah High Court — Whether Syariah High Court had jurisdiction to hear cases on contempt of custody order — Whether civil court had jurisdiction to hear cases involving syariah matters — Whether civil court had jurisdiction to review decision of Syariah Courts — Whether there was decision made by Syariah High Court — Whether application for judicial review premature — Whether leave granted unlawful as it was made by non-gazetted High Court judge — Whether there was illegality, irrationality, or procedural impropriety — Administration of The Religion of Islam (State of Selangor) Enactment 2003 ss 58 & 61(2)(b)(iii) — Federal Constitution art 121(1A) — Islamic Family Law (State of Selangor) Enactment 2003 Part VII — Rules of Court 2012 O 53 — Syariah Court Civil Procedure (State of Selangor) Enactment 2003 s 151

D

E

F

Islamic Law — Jurisdiction — High Court or Syariah Court — Syariah Court made interim custody order — Husband failed to comply with interim custody order — Wife filed application to Syariah High Court for leave to commence committal proceedings against husband — Syariah High Court allowed leave application — Husband filed judicial review against grant of leave by Syariah High Court — Whether Syariah High Court had jurisdiction to hear cases on contempt of custody order — Whether civil court had jurisdiction to hear cases involving syariah matters — Whether civil court had jurisdiction to review decision of Syariah Courts — Whether there was decision made by Syariah High Court — Whether application for judicial review premature — Whether leave granted unlawful as it was made by non-gazetted High Court judge — Whether there was illegality, irrationality, or procedural impropriety — Administration of The Religion of Islam (State of Selangor) Enactment 2003 ss 58 & 61(2)(b)(iii) — Federal Constitution art 121(1A) — Islamic Family Law (State of Selangor) Enactment 2003 Part VII — Rules of Court 2012 O 53 — Syariah Court Civil

G

H

I

Procedure (State of Selangor) Enactment 2003 s 151

The applicant and the first respondent were husband and wife before their marriage ended and as was common in any divorce case, the dispute for the custody of the children arose. The Selangor Syariah High Court ('the SHC') had made the custody order but the same was set aside by the Selangor Syariah Court of Appeal which then made an interim order as to the custody and visitation access to the children. When the applicant failed to bring the youngest child for visitation access as per the order, the first respondent filed an application for leave to commence committal proceedings at the SHC against the applicant. The SHC granted the leave application and ordered the applicant to show cause as to the reason for failing to comply with the SHC's order. Aggrieved, the applicant filed the present application for judicial review for an order to quash the said proceedings and a declaration that the SHC had no jurisdiction to give an order for contempt. The issues arose in the present application were: (a) whether the SHC had jurisdiction to hear cases on contempt of a custody order; (b) whether the civil court had jurisdiction to hear cases involving syariah matters as well as to review the decision of the Syariah Courts; and (c) the decisions, actions or omissions were improper or irrational or illegal — with respect to this issue, the applicant contended that the leave granted was unlawful because the leave was made by a non-*gazetted* High Court judge.

Held, dismissing the applicant's application for judicial review with no order as to costs:

(1) Order 53 of the Rules of Court 2012 ('the ROC') provided the procedural requirements for an application for judicial review. It was trite law that a decision in relation to the exercise of public duty or function may be reviewed on the grounds of illegality, irrationality, procedural impropriety, or disproportionality (see paras 13–14).

(2) Pursuant to s 61(2)(b)(iii) of the Administration of The Religion of Islam (State of Selangor) Enactment 2003 ('Enactment 1 of 2003') and Part VII of the Islamic Family Law (State of Selangor) Enactment 2003, it was evident that the Selangor Syariah Court had the jurisdiction to hear cases pertaining to the guardianship and custody of infants. Further, s 151 of the Syariah Court Civil Procedure (State of Selangor) Enactment 2003 clearly demonstrated that the SHC had jurisdiction for committal proceeding. Based on the above reasons and provisions, the court was of the view that the SHC had jurisdiction to hear and determine cases on committal proceedings which included contempt of court for a custody order (see paras 33–36).

(3) A reading of art 121(1A) of the Federal Constitution would reveal that proceedings before the Syariah Courts and decisions made by the Syariah

Courts could not be reviewed by the civil High Courts. The only exception that allowed the civil High Court to intervene in a Syariah Court matter was in the event it involved a constitutional issue. The committal order in this case (which the SHC had yet to issue) pertained to the violation of a custody order and visitation rights accorded by the SHC. This subject matter did not involve any constitutional issue. The enforcement of the judgment of a custody order was within the jurisdiction of the Syariah Court. Founded on the above, in relation to this case, it was plain that the civil court had no jurisdiction in respect of any matter within the jurisdiction of the Syariah Court nor could it review any decision of the Syariah Court (see paras 40, 45 & 47).

(4) Order 53 of the ROC allowed parties to file for judicial review when there was a decision, action or omission that encountered procedural unfairness. In this case, the order given by YA Tuan Mohd Asri bin Tahir regarding the impugned leave for the committal proceeding was merely a first step and inchoate. There was no decision given as regard to the committal. No committal order had been made against the applicant. As such, the application by the applicant for judicial review was premature (see paras 49, 51 & 54).

(5) It must be mentioned that the issue of YA Tuan Mohd Asri bin Tahir's appointment was not raised by the applicant in the O 53 statement or the applicant's affidavits. In this regard, the court should not consider this issue. Nonetheless, even if the court was to consider this issue, the court would find nothing illegal or unlawful. The court was of the view that the requirement to *gazette* the appointment was an administrative process. In the present case, YA Tuan Mohd Asri bin Tahir's appointment had been *gazetted* pursuant to s 58 of Enactment 1 of 2003. The date of appointment was stated as 2 January 2019. YA Tuan Mohd Asri bin Tahir's appointment was by His Royal Highness the Sultan. The *gazettement* of the appointment was for purposes of publication. The court was of the view that there was no illegality, irrationality, or procedural impropriety in the appointment of YA Tuan Asri or the proceedings for leave to commence committal against the applicant and the notice to show cause (see paras 55–57).

[Bahasa Malaysia summary

Pemohon dan responden pertama adalah suami isteri sebelum perkahwinan mereka berakhir dan seperti biasa dalam mana-mana kes perceraian, pertikaian hak penjagaan anak-anak timbul. Mahkamah Tinggi Syariah Selangor ('MTS') telah membuat perintah hak jagaan tetapi perintah tersebut telah diketepikan oleh Mahkamah Rayuan Syariah Selangor yang kemudiannya membuat perintah interim mengenai hak jagaan dan akses lawatan kepada anak-anak tersebut. Apabila pemohon gagal membawa anak bongsu untuk akses lawatan mengikut perintah tersebut, responden pertama memfailkan permohonan

kebenaran untuk memulakan prosiding pengkomitan di MTS terhadap pemohon. Mahkamah Tinggi Syariah membenarkan permohonan kebenaran tersebut dan mengarahkan pemohon untuk tunjuk sebab mengapa dia gagal mematuhi perintah MTS. Terkilan, pemohon memfailkan permohonan semasa untuk semakan kehakiman bagi mendapatkan perintah untuk membatalkan prosiding tersebut dan pengisytiharan bahawa MTS tidak mempunyai bidang kuasa untuk memberikan perintah penghinaan mahkamah. Isu-isu yang timbul dalam permohonan ini adalah: (a) sama ada MTS mempunyai bidang kuasa untuk mendengar kes-kes penghinaan perintah jagaan; (b) sama ada mahkamah sivil mempunyai bidang kuasa untuk mendengar kes-kes yang melibatkan perkara-perkara syariah serta menyemak keputusan Mahkamah Syariah; dan (c) keputusan, tindakan atau peninggalan adalah tidak wajar atau tidak rasional atau menyalahi undang-undang — berkenaan dengan isu ini, pemohon berhujah bahawa kebenaran yang diberikan adalah menyalahi undang-undang kerana kebenaran tersebut dibuat oleh hakim Mahkamah Tinggi yang tidak *diwartakan*.

Diputuskan, menolak permohonan pemohon untuk semakan kehakiman tanpa perintah berkaitan kos:

(1) Aturan 53 Kaedah-Kaedah Mahkamah 2012 ('KKM 2012') memperuntukkan keperluan prosedur untuk permohonan semakan kehakiman. Sudah menjadi undang-undang yang mantap bahawa keputusan berhubung dengan pelaksanaan tugas atau fungsi awam boleh disemak atas alasan kesalahan undang-undang, ketidakrasionalan, ketidakwajaran prosedur, atau ketidakseimbangan (lihat perenggan 13–14).

(2) Menurut s 61(3)(b)(iii) Enakmen Pentadbiran Agama Islam (Negeri Selangor) 2003 ('Enakmen 1 Tahun 2003') dan Bahagian VII Enakmen Undang-Undang Keluarga Islam (Negeri Selangor) 2003, terbukti bahawa Mahkamah Syariah Selangor mempunyai bidang kuasa untuk mendengar kes-kes berkaitan penjagaan dan jagaan kanak-kanak. Selanjutnya, s 151 Enakmen Tatacara Mal Mahkamah Syariah (Negeri Selangor) 2003 jelas menunjukkan bahawa MTS mempunyai bidang kuasa untuk prosiding pengkomitan. Berdasarkan alasan-alasan dan peruntukan-peruntukan di atas, mahkamah berpendapat bahawa MTS mempunyai bidang kuasa untuk mendengar dan menentukan kes prosiding pengkomitan yang termasuk penghinaan mahkamah untuk perintah jagaan (lihat perenggan 33–36).

(3) Pembacaan perkara 121(1A) Perlembagaan Persekutuan akan mendedahkan bahawa prosiding di hadapan Mahkamah Syariah dan keputusan yang dibuat oleh Mahkamah Syariah tidak boleh disemak oleh Mahkamah Tinggi sivil. Satu-satunya pengecualian yang membenarkan Mahkamah Tinggi sivil campur tangan dalam kes

Mahkamah Syariah adalah sekiranya ia melibatkan isu perlembagaan. Perintah pengkomitan dalam kes ini (yang masih belum dikeluarkan oleh MTS) adalah berkaitan dengan pelanggaran perintah jagaan dan hak lawatan yang diberikan oleh MTS. Perkara ini tidak melibatkan apa-apa isu perlembagaan. Penguatkuasaan penghakiman perintah jagaan adalah dalam bidang kuasa Mahkamah Syariah. Berdasarkan perkara di atas, berhubung dengan kes ini, adalah jelas bahawa mahkamah sivil tidak mempunyai bidang kuasa berkenaan dengan mana-mana perkara dalam bidang kuasa Mahkamah Syariah dan tidak boleh menyemak apa-apa keputusan Mahkamah Syariah (lihat perenggan 40, 45 & 47).

(4) Aturan 53 KKM 2012 membenarkan pihak-pihak memfailkan semakan kehakiman apabila terdapat keputusan, tindakan atau peninggalan yang menemui ketidakadilan prosedur. Dalam kes ini, perintah yang diberikan oleh YA Tuan Mohd Asri bin Tahir mengenai kebenaran yang disangkal untuk prosiding pengkomitan tersebut hanyalah langkah pertama dan 'inchoate'. Tiada keputusan yang diberikan berkenaan dengan pengkomitan tersebut. Tiada perintah pengkomitan telah dibuat terhadap pemohon. Oleh itu, permohonan oleh pemohon untuk semakan kehakiman adalah pramatang (lihat perenggan 49, 51 & 54).

(5) Perlu dinyatakan bahawa isu perlantikan YA Tuan Mohd Asri bin Tahir tidak dibangkitkan oleh pemohon dalam pernyataan A 53 atau afidavit-afidavit pemohon. Sehubungan itu, mahkamah tidak seharusnya mempertimbangkan isu ini. Walau bagaimanapun, walaupun mahkamah mempertimbangkan isu ini, mahkamah tidak akan mendapati apa-apa yang yang menyalahi undang-undang atau tidak sah. Mahkamah berpandangan bahawa keperluan untuk *mewartakan* pelantikan tersebut adalah satu proses pentadbiran. Dalam kes ini, pelantikan YA Tuan Mohd Asri bin Tahir telah *diwartakan* menurut s 58 Enakmen 1 Tahun 2003. Tarikh pelantikan telah dinyatakan pada 2 Januari 2019. Pelantikan YA Tuan Mohd Asri bin Tahir adalah oleh Kebawah Duli Yang Maha Mulia Seri Paduka Baginda Sultan. *Pewartaan* pelantikan tersebut adalah untuk tujuan penerbitan. Mahkamah berpandangan bahawa tiada kesalahan undang-undang, ketidakrasionalan, atau ketidakwajaran prosedur dalam pelantikan YA Tuan Asri atau prosiding untuk kebenaran untuk memulakan pengkomitan terhadap pemohon dan notis tunjuk sebab tersebut (lihat perenggan 55–57).]

Cases referred to

Council of Civil Service Unions and others v Minister for the Civil Service [1985] AC 374, HL (refd)

Detik Hartamas Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2022] 12 MLJ 233; [2022] 4 CLJ 112, HC (refd)

Emilia bt Hanafi v Datuk Wira SM Faisal bin Tan Sri SM Nasimuddin Kamal &

Ors [2022] MLJU 3322; [2023] 1 CLJ 897, HC (refd)
Hisham bin Halim v Maya bt Ahmad Fuaad & Ors [2021] MLJU 2293, HC (refd)
Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545; [2018] 2 MLRA 1, FC (refd)
Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd [2017] 2 MLJ 197; [2017] 5 CLJ 283, CA (refd)
Ong Keh Keong v Lembaga Tatatertib Peguam-Peguam [2020] MLJU 1285; [2020] 10 CLJ 181, CA (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)

Legislation referred to

Administration of the Religion of Islam (State of Selangor) Enactment 2003 s 55, 58, 61, 61(2)(b)(iii)
Federal Constitution arts 4(1), 121, 121(1), (1A), Ninth Schedule, List II
Islamic Family Law (State of Selangor) Enactment 2003 Part VII
Rules of Court 2012 O 53
Syariah Court Civil Procedure (State of Selangor) Enactment 2003 Parts XXIV, XVIII s 151 s 229

Nizam Bashir bin Abdul Kariem (with Malik Imtiaz Sarwar, K Shanmuga, Kee Hui Yee, Amer Ashrhaf Azuddin and Lim Yvonne) (Nizam Bashir & Assoc) for the applicant.
Abd Shukor bin Ahmad Shukor (Baljit & Partners) for the first respondent.
Khairul Nizam Abu Bakar (with Nurul Izzah bt Abdul Mutalib) (Selangor State Legal Advisor's Office) for the second, fourth and seventh respondents.
Hanir bin Hanbali (with Mohammad Sallehuddin bin Md Ali) (Legal Department) for the third and eighth respondents.
Kamaruzaman Arif (with Sofiah Omar) (Kamaruzaman Arif & Sofiah) for the intervener.

Shahnaz Sulaiman J:

INTRODUCTION

[1] This is an application for judicial review by the applicant, Hisham bin Halim for, inter alia, an order to quash the proceedings by the Selangor Syariah High Court ('SHC') taken out by the first respondent to cite the applicant for contempt and a declaration that the SHC has no jurisdiction to give an order for contempt.

[2] Leave to commence judicial review proceedings was granted by this court on 9 September 2021.

RELIEFS SOUGHT

[3] The applicant seeks the following reliefs in this application for judicial review:

1.1. Suatu Deklarasi bahawa Mahkamah Tinggi Syariah Selangor, iaitu Responden Kelima, tidak memiliki bidangkuasa atau kuasa untuk menghukum Pemohon untuk penghinaan Mahkamah vide Mahkamah Tinggi Syariah Selangor Permohonan No.: 10100-075–0829–2019 ('Permohonan Komital Selangor') atau sebaliknya;

1.2. Berkenaan dengan Permohonan Syariah Selangor:

a. suatu Perintah Larangan yang menahan segala prosiding dalam Permohonan Komital Selangor; dan

b. suatu perintah Certiorari yang membatalkan Notis Permohonan bermeterai, yang lebih dikenali sebagai Permohonan No. 10100-075-0829-2019 yang bertarikh 19.09.2019, Notis Tunjuk Sebab bertarikh 23.10.2019 dan pembatalan semua surat, notis, arahan, perintah atau arahan yang mesti dipatuhi ('peremptory') atau sebaliknya apa-apa arahan lain yang dikeluarkan oleh atau bagi pihak Responden-responden Keempat atau Kelima yang berkenaan dengan Permohonan Komital Selangor.

1.3. Sebarang arahan, perintah atau writ lain bagi penguatkuasaan hak-hak yang diberikan oleh Bahagian II Perlembagaan Persekutuan,atau mana-mana daripada mereka, atau untuk memberikan keadilan yang sepenuhnya di dalam perkara di dalam ini.

1.4. Suatu perintah, bahawa dalam apa cara sekalipun, tiada kos akan diawadkan bagi atau terhadap Pemohon; dan

1.5. Lain-lain relif sepertimana yang difikirkan suaimanfaat oleh Mahkamah Yang Mulia ini.

C. Selaras dengan Aturan 53 Kaedah 3(5) Kaedah-kaedah Mahkamah 2012, suatu perintah untuk menggantungkan sebarang dan semua prosiding di hadapan Responden Kelima dan secara khususnya prosiding yang dikenali sebagai Permohonan No. 10100-075-0829-2019 sehingga pelupusan muktamad pendengaran prosiding semakan kehakiman.

FACTUAL BACKGROUND

[4] The applicant was the husband to the first respondent. The dispute for the custody of their children became an issue as they stepped into the grave of their marriage at the SHC.

[5] While waiting for another SHC judge to heard the custody dispute, the Selangor Syariah Court of Appeal set aside the original SHC judge's custody order and gave an interim order as to the custody and access to the children, as follows:

(a) the eldest daughter to the first respondent; and

(b) the youngest daughter to the applicant;

(c) access to the two children be held every Tuesday and Friday in the Shah Alam Syariah High Court from 9am till 12pm with the same supervised by police or court officers; and

(d) the applicant and the first respondent to bring the children to court for the said purpose.

[6] However, problems emerged when the applicant accused the first respondent of not bringing the eldest daughter to the custody visit and because of that, the applicant too stopped bringing the youngest daughter to the same visit, as alleged by the first respondent.

[7] As a result of the applicant's failure to bring the youngest child for visitation access, the first respondent in return filed an application for leave to commence committal proceedings at the SHC against the applicant.

[8] On 8 October 2019, the SHC proceeded with the first respondent's application for leave to commence committal proceedings. The first respondent was granted leave. Subsequently the applicant was asked to show cause as to the reason for failing to comply to the SHC's order.

[9] Frustrated with the SHC's order, the applicant filed this application for judicial review on 28 May 2021, approximately 18 months later. The applicant sought, among others, to have the committal proceedings invalidated.

GROUNDS FOR JUDICIAL REVIEW

[10] The applicant raised seven grounds in this application for judicial review. This court has perused the grounds and has reduced the issues to be considered to the following:

(a) whether the SHC has jurisdiction to hear contempt for a custody order;

(b) whether the civil court has jurisdiction to hear cases involving syariah matters as well as review the decision of the syariah courts; and

(c) the decisions, actions or omissions are improper/irrational/illegal.

[11] The fundamental question that is required to be decided by this court is whether the SHC has the power or jurisdiction to punish an individual for contempt of court.

[12] After the hearing this application for judicial review, this court dismissed the applicant's application for judicial review. This is this court's judgment setting out the full reasons for the decision.

PRINCIPLES RELATING TO JUDICIAL REVIEW

[13] Order 53 of the Rules of Court 2012 makes provision for the procedural requirements for an application for judicial review.

[14] With regard to judicial review, it is trite law that a decision in relation to the exercise of public duty or function may be reviewed on the grounds of illegality, irrationality, procedural impropriety or disproportionality. What amounts to illegality, irrationality and procedural impropriety has been succinctly laid down by Lord Diplock in the case of *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] AC 374 which was adopted by the Federal Court in the case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 as follows:

> In this context, it is useful to note how Lord Diplock (at pp 410–411) defined the three grounds of review, to wit: (i) illegality, (ii) irrationality, and (iii) procedural impropriety. This is how he put it:
>
> > By 'illegality' as a ground for Judicial Review I mean that the decision maker must understand directly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exerciseable.
> >
> > By 'irrationality' I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness' (see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.
> >
> > Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in *Edwards v Bairstow* [1956] AC 14, of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.
> >
> > I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failing to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to Judicial Review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down

in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.

[15] Founded on the principles of judicial review, this court will proceed to examine the arguments advanced by parties.

ANALYSIS AND FINDINGS

Whether the SHC has jurisdiction to hear contempt for a custody order

[16] The fundamental issue in this judicial review's application is whether the SHC has the power or jurisdiction to punish an individual for contempt of court. To consider this, this court looked at the enactment establishing the SHC.

[17] The Selangor Syariah Courts are established pursuant to s 55 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ('Enactment 1 of 2003') which reads as follows:

Establishment of Syariah Courts

(1) His Royal Highness the Sultan, on the advice of the Majlis, may by notification in the Gazette constitute Syariah Subordinate Courts for the State of Selangor at such places as he considers fit

(2) His Royal Highness the Sultan, on the advice of the Majlis, may by notification in the Gazette constitute a Syariah High Court for the State of Selangor.

(3) His Royal Highness the Sultan, on the advice of the Majlis, may by notification in the Gazette constitutes a Syariah Appeal Court for the State of Selangor.

(4) His Royal Highness the Sultan, on the recommendation of the Chief Syarie Judge, may prescribe a code of ethics which must be observed by all Syarie Judges and Syariah Appeal Court Judges.

[18] The jurisdiction of a SHC can be found in s 61 of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 which reads:

Jurisdiction of Syariah High Court

(1) A Syariah High Court shall have jurisdiction throughout the State of Selangor and shall be presided over by a Syariah High Court Judge.

(2) Notwithstanding subsection (1), the Chief Syarie Judge may sit as a Syariah High Court Judge and preside over such Court.

(3) The Syariah High Court shall —

(a) in its criminal jurisdiction, try any offence committed by a Muslim and punishable under the Syariah Criminal Offences Enactment (Selangor) 1995 [En. No. 9/1995] or under any other written law for the time being in force which prescribes offences; and

(b) *in its civil jurisdiction*, hear and determine all actions and proceedings if all the parties to the actions or proceedings are Muslims and the actions or proceedings relate to —

(i) betrothal, marriage, ruju', divorce, annulment of marriage (fasakh), nusyuz, or judicial separation (faraq) or any other matter relating to the relationship between husband and wife;

(ii) any disposition of or claim to property arising out of any of the matters set out in subparagraph (i);

(iii) the maintenance of dependants, legitimacy, or *guardianship or custody (hadhanah) of infants*

(iv) the division of, or claims to, harta sepencarian;

(v) wills or gifts made while in a state of marad-almaut;

(vi) gifts inter vivos, or settlements made without adequate consideration in money or money's worth by a Muslim;

(vii) wakaf or nazr;

(viii) division and inheritance of testate or intestate property;

(ix) the determination of the persons entitled to share in the estate of a deceased Muslim or the shares to which such persons are respectively entitled;

(x) a declaration that a person is no longer a Muslim;

(xi) a declaration that a deceased person was a Muslim or otherwise at the time of his death;

(xii) administration of mosques; and

(xiii) other matters in respect of which jurisdiction is conferred by any written law. (Emphasis added.)

[19] It is plain from a reading of s 61(2)(b)(iii) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 that the Selangor Syariah Court has the jurisdiction to hear cases pertaining to the guardianship and custody of infants.

[20] The power of SHC to make any order for custody provided under Part VII of the Islamic Family Law (State of Selangor) Enactment 2003 ('Enactment 2 of 2003') which encompasses ss 82–105 as below:

PART VII GUARDIANSHIP

A Hadhanah or Custody of Children

82. Persons entitled to custody of a child

83. Qualifications necessary for custody

84. How right of custody is lost

B

85. Duration of custody

86. Custody of illegitimate children

87. Power of the Court to make order for custody

C 88. Orders subject to conditions]

89. Persons entitled to guardianship

90. Power over immovable and movable property

91. Appointment of guardians by the Court

D

92. Appointment of mother as testamentary guardian

93. Joint guardian with mother

94. Variation of power of guardian of property

E 95. Removal of guardian

96. Security to be given

97. Limitation of powers of guardian appointed by Court

F 98. Guardian may not give discharge for capital property

99. Guardian may support minor out of income

100. Special order in case of small estate

101. Application for opinion, etc.

G

102. Prohibition order by Court

103. Guardian of orphans

104. Court to have regard to advice of welfare officers, etc.

H 105. Power of Court to restrain taking of child out of Malaysia

[21] Nonetheless, Part XVIII of the Syariah Court Civil Procedure (State of Selangor) Enactment 2003 provides for Enforcement and Execution. Specifically, s 151 reads:

I Enforcement of judgment to do or abstain from doing an act

(1) Where —

(a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that

time or within that time as extended or abridged under section 238, as the case may be; or

(b) a person disobeys a judgment or order requiring him to abstain from doing an act,

then, subject to this Enactment, the judgment or order may be enforced by one or more of the following means, that is to say —

(aa) with the leave of the Court, an order of committal; or

(bb) where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body.

(2) Where a judgment or an order requires a person to do an act within a time specified therein and an order is subsequently made under section 152 requiring the act to be done within some other time, references in subsection (1) to a judgment or an order shall be construed as references to the order made under section 152.

(3) Where under any judgment or order requiring the delivery of any movable property the delivery of any movable property, the person liable to execution has the alternative of paying the assessed value of the property, and the judgment or order shall not be enforceable by order of committal under subsection (1), the Court may, on the application of the person entitled to enforce the judgment or order, make an order requiring the first mentioned person to deliver the property to the applicant within a time specified in the order and that order may be so enforce.

(4) An application under subsection (3) shall be made in Form MS 33 and supported by an affidavit and a copy of the application and the affidavit shall be served on the person against whom the order is to be enforced.

[22] Section 151 of the Syariah Court Civil Procedure (State of Selangor) Enactment 2003 clearly demonstrates that SHC has jurisdiction for committal proceeding.

[23] Moreover, Part XXIV of the Syariah Court Civil Procedure (State of Selangor) Enactment 2003 ('the 2003 Enactment') provides for contempt of court. Specifically, s 229 of the 2003 Enactment reads:

229 Notice to show action or cause

(1) The Court shall have the jurisdiction to commence proceedings against any person for contempt of Court and may, in such proceedings, make an order of committal for a period not exceeding six months or may impose a fine not exceeding two thousand ringgit.

(2) Where contempt is committed in the face of the Court, it shall not be necessary for the Court to serve the notice to show cause but the Court shall ensure that the person alleged to be in contempt understands the

nature of the offence alleged against him and has the opportunity to be heard in his own defence, and shall make a proper record of the proceedings.

(3) In the case of contempt committed outside Court, notice to show cause why an action or proceedings should not be taken against him shall be served personally on the person alleged to have committed such contempt.

[24] The facts of this application are that the applicant and the first respondent were married on 18 August 2019. The couple have since divorced. They are blessed with two daughters.

[25] The SHC granted interim custody of the daughters to the first respondent on 23 February 2017. On 9 August 2017 the SHC granted interim custody of the daughters to the applicant.

[26] Subsequently, on 9 October 2017 the Selangor Syariah Court of Appeal, pursuant to first respondent's application for revision exercised its powers of revision and made the following orders:

(a) set aside the interim custody order made by the SHC;

(b) granted interim custody of:

(i) the eldest daughter to the first respondent; and

(ii) the youngest daughter to the applicant.

(c) access to the two children be held every Tuesday and Friday in the SHC from 9am till 12pm with the same supervised by police or court officers; and

(d) ordered the applicant and the first respondent to bring the daughters to court for the said purpose.

[27] The first respondent had on 20 September 2019 filed the first respondent's leave application for committal against the applicant on the basis that the applicant purportedly failed to attend access appointments since 30 April 2019.

[28] On 8 October 2019 the SHC allowed the first respondent's leave application for committal. A notice to show cause was served by the solicitors of the first respondent on 23 October 2019.

[29] On 28 November 2019 the applicant filed a (first) notice application to raise a preliminary objection dated 28 November 2019. This (first) notice application to raise a preliminary objection was dismissed on 29 January 2020.

[30] Applicant then files a (second) notice application to raise a preliminary objection on 1 February 2021. This (second) notice application to raise a preliminary objection was struck out on 22 February 2021.

[31] On 16 March 2021, a stay on the first respondent's committal was allowed but maintained the hearing date of the first respondent's leave application for committal.

[32] This court is mindful that at the time of filing of this application for judicial review, there is no committal order against the applicant by the SHC. Leave was allowed by the SHC for committal proceedings to commence and the applicant was served with a notice to show cause by the SHC. Notice to show cause is, in the view of this court, only the beginning of the commencement of a committal proceeding and there are many other steps to be taken before the SHC can come to a proper decision whether the applicant has committed the offence. This committal proceedings were conducted as the applicant had failed to bring the youngest daughter to the Shah Alam Syariah Court for access which is supervised by police or Court officers.

[33] Pursuant to s 61(2)(b)(iii) of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 and Part VII of the Islamic Family Law (State of Selangor) Enactment 2003 it is evident that the Selangor Syariah Court has the jurisdiction to hear cases pertaining to the guardianship and custody of infants.

[34] Furthermore, s 151 of the Syariah Court Civil Procedure (State of Selangor) Enactment 2003 clearly demonstrates that SHC has jurisdiction for committal proceeding. As a consequence of disobeying the order of court, an order of committal may be given with leave of the court.

[35] Based on this section, the first respondent was exercising her rights in filing a committal application in the SHC when the applicant had violated the custody order of the SHC. This court is of the considered view that it is within the jurisdiction of the SHC to hear and decide such a case or application.

[36] For the aforementioned reasons and the provisions of the law, this court is of the view that the SHC has jurisdiction to hear and determine cases on committal proceedings which includes contempt of court for a custody order.

Whether the civil court has jurisdiction to hear cases involving syariah matters as well as review the decision of the Syariah Courts

[37] This court was urged by the applicant to consider that the civil courts are empowered to review the decision of the SHC. In so doing, this court examined the provisions of the Federal Constitution.

[38] Article 121 of the Federal Constitution reads:

> Judicial power of the Federation
>
> (1) There shall be two High Courts of co-ordinate jurisdiction and status, namely:
>
> (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and
>
> (b) one in the States of Sabah and Sarawak, which shall be known as the High Court in Sabah and Sarawak and shall have its principal registry at such place in the States of Sabah and Sarawak as the Yang di-Pertuan Agong may determine;
>
> (c) (Repealed),
>
> and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.
>
> (1A) *The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.* (Emphasis added.)

[39] In Federal Constitution further provides in the Ninth Schedule, List II — State List as follows:

> Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, betrothal, *marriage, divorce*, dower, maintenance, adoption, legitimacy, *guardianship,* gifts, partitions and non-charitable trusts; ... the constitution, organization and procedure of *Syariah courts*, which *shall have jurisdiction only over persons professing the religion of Islam* and in respect only of any of the matters included in this paragraph ... (Emphasis added.)

[40] A reading of art 121(1A) of the Federal Constitution would reveal that proceedings before the Syariah Courts and decisions made by the Syariah Courts cannot be reviewed by the civil High Courts.

[41] In this regard, this court can do no better than to quote from my learned brother Ahmad Kamal Mohd Shahid J in the case of *Emilia bt Hanafi v Datuk Wira SM Faisal bin Tan Sri SM Nasimuddin Kamal & Ors* [2022] MLJU 3322; [2023] 1 CLJ 897 as follows:

> [55] The insertion of art 121(1A) of the FC is to stop the practice of aggrieved parties coming to the Civil High Courts to review the decisions made by the Syariah

Courts (see *Sukma Darmawan Sasmitaat Madja v Ketua Pengarah Penjara Malaysia & Anor* [1999] 2 MLJ 241; [1999] 2 CLJ 707; [1999] 1 MLRA 175; [1999] 2 AMR 2337).

[56] The proceedings and decisions of the Syariah Courts are not amenable to judicial review by the civil High Courts because the Syariah Courts and the civil courts form two separate legal systems and the Syariah Courts are not inferior to the civil courts in terms of appeal and judicial review by superior courts over inferior courts (see *Syarifah Nooraffyzza Wan Hosen v Director of Jabatan Agama Islam Sarawak & Ors* [2018] 2 MLJ 354; [2018] 3 CLJ 620; [2017] 6 MLRA 345; [2017] 2 SLR 387).

[57] Hence, it can be seen that the civil High Court has no power to intervene with the matter that falls exclusively under the jurisdiction of the Syariah Court. Once the matter is found to be within the jurisdiction of the Syariah Court by virtue of art 121(1A) of the FC, the civil court is not allowed to intervene or hear such matter unless it involves a constitutional issue which the Syariah Court has no power to hear (see *Rosliza Ibrahim v Kerajaan Negeri Selangor & Anor* [2021] 2 MLJ 181; [2021] 3 CLJ 301; [2021] 2 MLRA 70).

[42] This court concurs with the learned judge in *Hisham bin Halim v Maya bt Ahmad Fuaad & Ors* [2021] MLJU 2293 as reproduced below:

[10] The above art 121(1A) of the FC clearly protects the Syariah Court's proceeding from the Civil Court's interference.

[11] Further, the Federal Court in the case of *Subashini Rajasingam v Saravanan Thangathoray & other appeal* [2008] 2 MLJ 147 at p 171; [2007] 3 MLRA 81; [2008] 2 CLJ 1 held that:

> Thus, the civil court cannot be moved to injunct a validly obtained order of a Syariah Court of competent jurisdiction. The injunction obtained by the wife, although addressed to the husband, was in effect a stay of proceedings of the husband's applications in the Syariah High Court and this amounts to an interference by the High Court of the husband's exercise of his right as a Muslim to pursue his remedies in the Syariah High Court. Obviously, the law does not permit such an interference.

[15] Further, I am of the opinion that if the Syariah Court proceeding keep being injunct in the Civil Court, it will deter the Syariah Court judges from performing its function under the law and would cause delay and/or embarrass the proceeding between the parties at the Syariah Court which would eventually denied justice to the parties before the Syariah Court.

[43] To reiterate, the civil High Courts cannot meddle into the affairs of the Syariah Court. The civil High Court has no power to intervene in matters which are exclusively under the jurisdiction of the Syariah Courts. This is plainly clear from the provisions of art 121(1A) of the Federal Constitution. The only exception that allows the civil High Court to intervene in a Syariah Court matter is in the event it involves a constitutional issue.

[44] The next question is whether this present application before this court involves a constitutional issue. In this application, the matter at hand is pertaining to a committal order (which the SHC has yet to issue) and whether the SHC has the jurisdiction to issue such an order of committal.

[45] The committal order in this case (which the SHC has yet to issue) pertains to the violation of a custody order and visitation rights accorded by the SHC. In the considered view of this court, this does not relate to a constitutional issue. This subject matter does not involve any constitutional issue. The enforcement of the judgment of a custody order is within the jurisdiction of the Syariah Court.

[46] In this regard, the case of *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545; [2018] 2 MLRA 1, the Federal Court stated:

> [67] Clearly then, both cll (1) and (1A) of art 121 of the Federal Constitution illustrate the respective regimes in which each court operates. Thus issues of jurisdiction and conferment of powers in the civil courts and the syariah courts are clearly drawn. What they (cll (1) and (1A) art 121 of the Federal Constitution) illustrate is that, both the civil and syariah courts co-exist in their respective spheres, even if they are dissimilar in the extent of their powers and jurisdiction, in that the civil courts are possessed of powers, fundamental and intrinsic, as outlined in the Federal Constitution.
>
> [68] In this it is emphasised that, if the relief sought by a plaintiff is in the nature of the 'inherent powers' of the civil court (for example judicial review) or if it involves constitutional issues or interpretation of the law, then the civil courts would be seized with jurisdiction to determine the issue, regardless of its subject matter and especially if it comes within the scope and ambit of judicial powers as outlined above.

[47] Founded on the above, and by virtue of art 121(1A) of the Federal Constitution, it is plain that the civil court has no jurisdiction in respect of any matter within the jurisdiction of the Syariah Court nor can it review any decision of the Syariah Court.

[48] However, it is not this court's objective nor intention to denote that civil courts have no jurisdiction to supervise Syariah Court cases. The civil superior courts retained supervisory jurisdiction which was inherent in their function under arts 4(1) and 121(1) of the Federal Constitution. Order 53 of the Rules of Court 2012 allows parties to file for judicial review when there is a decision, action or omission that encounters procedural unfairness.

The decisions, actions or omissions are improper/irrational/illegal

[49] Order 53 of the ROC allows parties to file for judicial review when there is a decision, action or omission that encounters procedural unfairness.

[50] The applicant contended that the impugned leave for committal proceedings in this case on 8 October 2019 by YA Tuan Mohd Asri bin Tahir was unlawful. It was argued that the leave granted was made by a non-*gazetted* High Court judge.

[51] This court is of the view the order given by YA Tuan Mohd Asri bin Tahir regarding the impugned leave for the committal proceeding in this case is merely a first step and inchoate. There is no decision given as regard to the committal. No committal order has been made against the applicant.

[52] In this case, the application by the applicant is premature. In the case of *Ketua Pengarah Hasil Dalam Negeri v Mudah.my Sdn Bhd* [2017] 2 MLJ 197; [2017] 5 CLJ 283, the Court of Appeal had held that for O 53 of the Rules of Court 2012 to apply, there must first be a 'decision' by the public authority in question, and in the absence of such 'decision', any application for judicial review is premature. The following excerpt from the case is relevant:

> [15] ... In the absence of a decision by the respondent, the applicant not only lacked a sufficient interest or locus standi to make the application, but that its application was premature. We accept that for there to be a judicial review of executive action under O 53 of the ROC 2012, there must first be a decision by the public authority. That, we discern, is the statutory requirement and well-established legal principle repeated and applied by our courts ...

[53] See also the case of *Ong Keh Keong v Lembaga Tatatertib Peguam-Peguam* [2020] MLJU 1285; [2020] 10 CLJ 181.

[54] In the present case, subsequent to the granting of leave by the SHC to commence the committal proceedings, the hearing of the committal proceedings has not yet taken place, and the SHC has not yet made any determination of whether the applicant is or is not in contempt of court.

[55] The applicant argued that the impugned leave for the committal proceedings in this case was made on 8 October 2019 by YA Tuan Mohd Asri bin Tahir is defective because it was unlawfully made by YA Tuan Mohd Asri bin Tahir. It must be mentioned that the issue of YA Tuan Mohd Asri bin Tahir's appointment was not raised by the applicant in the O 53 statement or the applicant's affidavits. In this regard, this court should not consider this issue (see: *Detik Hartamas Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2022] 12 MLJ 233; [2022] 4 CLJ 112).

[56] Nonetheless, even if this court were to consider this ground, this court would find nothing illegal or unlawful. This court referred to the s 58 (Enactment 1 of 2003). Section 58 (Enactment 1 of 2003) provides that it is His Royal Highness the Sultan who may appoint Syariah High Court judges. The requirement to *gazette* the appointment, in the considered view of this court, is an administrative process.

[57] In this case, YA Tuan Mohd Asri bin Tahir's appointment was *gazetted* in the Warta Kerajaan Negeri Selangor No 3176 Jld 74 No 36 dated 23 December 2021 and it was exhibited in encl 68, p 6, affidavit filed by intervener. Hence, it the fact is that YA Tuan Mohd Asri bin Tahir's appointment has been *gazetted* pursuant to s 58. The date of appointment was stated as 2 January 2019. YA Tuan Mohd Asri bin Tahir's appointment was by His Royal Highness the Sultan. The *gazettement* of the appointment was for purposes of publication. this court is of the considered view there is no illegality, irrationality or procedural impropriety in the appointment of YA Tuan Asri or the proceedings for leave to commence committal against the applicant and the notice to show cause.

CONCLUSION

[58] For the aforementioned reasons, this court dismisses this application for judicial review with no order as to costs.

Applicant's application for judicial review dismissed with no order as to costs.

Reported by Dzulqarnain Ab Fatar